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73-1858

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No.

MON VALLEY TERMINAL, INC., GUTTMAN OIL COMPANY, AND 2.080 ACRES OF LAND, MORE OR LESS, SITUATE IN WASHINGTON, WESTMORELAND, AND FAYETTE COUNTIES, STATE OF PENNSYLVANIA, PETITIONERS

-v-

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1974

NO.

MON VALLEY TERMINAL, INC.,
GUTTMAN OIL COMPANY, AND
2.80 ACRES OF LAND, MORE OR LESS,
SITUATE IN WASHINGTON,
WESTMORELAND, AND FAYETTE COUNTIES,
STATE OF PENNSYLVANIA, PETITIONERS

— v —

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, Mon Valley Terminal, Inc., Guttman Oil Company, and 2.80 Acres of Land, situate in Washington, Westmoreland and Fayette Counties, in the State of Pennsylvania, hereinafter called petitioners, respectfully pray that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 12, 1974, which affirmed the Order and Pre-trial Ruling by the United States District Court for the Western District of the State of Pennsylvania. The said Order and Pre-trial Ruling

were entered by the District Court in two cases involving petitioners, which were consolidated by the Court of Appeals.

OPINION BELOW

The judgment order of the Third Circuit Court of Appeals, RE: Mon Valley Terminal, Inc., et al., Appts. vs. U.S.A. **No. 73-1771** (D.C. Civil No. 72-1044). U.S.A. v.s. 2.80 Acres of Land, etc., et al. **No. 73-1980** (D.C. Civil No. 66-173), appears in the Appendix hereto. The Order and Pre-trial Ruling rendered by the District Court for the Western District of Pennsylvania also appear in the Appendix.

JURISDICTION

The judgment order of the Third Circuit of Appeals was granted on March 12, 1974, and was issued by the Court on April 3, 1974. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. — 1254 (1).

QUESTIONS INVOLVED

A. May the owner of private property whose utility is destroyed as the result of the activities of agents and employees of the United States recover under the provisions of 28 U. S. C. 1346, the Tucker Act?

B. May the UNITED STATES avoid its obligation to pay compensation because of exculpatory language contained in the permit granted Petitioners permission to build a dock?

C. Does the United States owe compensation to Petitioners for the destruction of the utility of their dock as the result of the government's flood control activities?

STATUTORY PROVISIONS INVOLVED

1. United States Code. Constitution:
Amendment Five

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. United States Code, Title 28:
— 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims of:

(1) . . . any other civil action or claim against the United States, not exceeding $10.000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of

this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

3. United States Code, Title 33:

—591. **CONDEMNATION, PURCHASE, AND DONATION OF LAND AND MATERIALS**

The Secretary of the Army may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings, for the acquirement by condemnation of any land, right of way, or material needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors for which provision has been made by law; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: **Provided, however,** that when the owner of such land, right of way, or material shall fix a price for the same, which in the opinion of the Secretary of the Army, shall be reasonable, he may purchase the same at such price without further delay: **And Provided further,** that the Secretary of the Army is authorized to accept donations of lands or materials required for the maintenance or prosecution of such works. April 24, 1888, c. 194, 25 Stat. 94.

STATEMENT OF THE CASE

Mon Valley Terminal, Inc., is a corporation, organized and existing under and by virtue of the Com-

monwealth of Pennsylvania, and owns the wharf at issue in the Borough of Speers in the County of Washington, Commonwealth of Pennsylvania, which is within the territorial jurisdiction of the United States District Court for the Western District of Pennsylvania. Guttman Oil Company is a corporation, organized and existing under and by virtue of the Commonwealth of Pennsylvania and leased the wharf at issue from Mon Valley Terminal, Inc.

In December 1966, and before and after that time, Mon Valley Terminal, Inc., was, has been, and still is the owner of riparian land along the Monongahela River. On or before December 31, 1949, pursuant to permission granted by the United States Army Corps of Engineers on November 2, 1946, a predecessor in title to Petitioner Mon Valley Terminal, Inc., had constructed a wharf and appurtenances along the Monongahela River on the said land.

The riparian land was the subject of the condemnation proceeding, No. 66-173, in which a 0.44 - acre permanent flowage easement was taken in a 16.02 - acre tract owned by Mon Valley. The declaration of taking was filed on February 11, 1966. The easement was acquired for the operation and maintenance of the Dam Number Four Project described below. The subject wharf was completed prior to 1950, and was leased from Mon Valley by Guttman Oil at the same time the condemnation was commenced.

At the time of the aforesaid construction and on and immediately before December 11, 1966, the ordinary high water mark of the Monongahela River at the situs of the subject property was 743.5 feet and the ordinary pool level was 737.5 feet. The floor of the

aforesaid wharf was constructed at a level of 747.5 feet, ten feet vertically above the ordinary pool level, at a level specifically calculated to enable ships and barges to land and unload their wares at said wharf.

Both before and after December 11, 1966, the Government of the United States had been engaged in the construction and operation of a dam, known and designated the Dam No. 4, Monongahela River, in the bed of said river and across the channel thereof. The effect of this dam, which materialized after December 11, 1966, was to raise the ordinary pool elevation of the water in the Monongahela River at the situs of the aforesaid wharf by 6 feet, thereby reducing the vertical distance between the floor of the wharf and the ordinary elevation of the surface of the Monongahela River from approximately 10 feet to 4 feet. Consequently ships and barges on the Monongahela River, which had previously utilized the aforesaid wharf and accompanying facilities and appurtenances, ride too high in the water to use the wharf, thereby destroying the utility of the wharf and its accompanying facilities and appurtenances.

Neither the Government of the United States, nor any officer or agent thereof has at any time set up claim of title for right of flowage upon and over the wharf of Petitioners.

On December 7, 1972, petitioners filed a complaint against the United States based on the Tucker Act, 28 U. S. C. —1346 (a) (2) for the loss of the utility of their property, a dock located on the Monongahela River, as the result of government flood control activity. Both the Tucker Act suit and the condemnation action were commenced in the same court.

Respondent thereupon filed an answer and presented a Motion for Summary Judgment on the basis that the loss of the utility of Petitioners' dock was not a compensable taking under the Fifth Amendment and that Petitioners at all times were subject to the dominant navigational servitude vested in Defendant and conferred upon it by the Commerce clause of the Constitution.

On May 22, 1973, in the condemnation action, the district court filed a pretrial ruling pursuant to the Government's request, holding that Mon Valley was not entitled to compensation for the wharf being rendered less functional as a result of the Government raising the level of the river to the normal high water mark for navigational purposes for the following reasons: (1) That pursuant to the revocable permit of November 26, 1946, compensation was expressly denied according to sub-paragraph (g) which states:

> That the United States shall in no case be liable for any damage or injury to the structure or work herein authorized which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claim or right to compensation shall accrue from any such damage.

(2) That the power to regulate navigation confers upon the United States a dominant servitude which extends to the ordinary or normal high water mark, and that any loss of access to a riparian owner's land to navigable waters is not compensable under the Fifth Amendment as announced in **United States v. Rands**, 389 U. S. 121 (1967).

On July 3, 1973, the district court filed an order granting the motion of the United States for summary judgment in the Tucker Act suit for the reasons stated in the condemnation pretrial ruling of May 22, 1973.

On August 1, 1973, Mon Valley and Guttman Oil filed a notice of appeal from the July 3, 1973, summary judgment order. On September 14, 1973, the district court, pursuant to 28 U. S. — 1292 (b), filed an order granting Mon Valley permission to appeal from the condemnation pretrial ruling filed May 22, 1972.

On February 27, 1974, hearing was held before the United States Third Circuit Court of Appeals. On March 12, 1974 the Third Circuid handed down a judgment order affirming the pre-trial ruling and summary judgment order affirming the pre-trial ruling and summary judgment order of the District Court. This Order was issued April 3, 1974. It is for review of the said judgment order of the Third Circuit that the petitioners request that a writ of certiorari issue.

REASONS FOR GRANTING WRIT

The Fifth Amendment to the Constitution of the United States of America guarantees each person, "* nor shall private property be taken for public use, without just compensation." U. S. C. Const. Amend. 5. The United States Army Corp of Engineers, agents of the United States Government, altered Dam No. 4 on the Monongahela River causing the water level to rise six feet. This change in water level destroyed the utility of petitioner's wharf, constituting a compensable taking under the Fifth Amendment. The peti-**

tioners request that a Writ of Certiorari issue to the Third Circuit Court of Appeals for the following reasons.

1. The opinions below were based on early decisions involving the concepts of navigational servitude. The concept was created in **Monongahela Navigation Co. v. United States**, 148 U. S. 312, 37 L. Ed. 463, 13 S. Ct. 622 (1893) and culminated in the case on which the Circuit Court based its order, **United States v. Rands**, 389 U.S. 121, 19 L. Ed. 329, 88 S. Ct. 265 (1967). While **U. S. v. Rands**, supra, is a recent decision the opinion is based on precedent and the policy of store decisis rather than on analysis of the facts and circumstances in the light of the navigation servitude. This concept arose out of the economid and commercial needs of a growing but undeveloped nation in the 19th century. The passage of time and changed circumstances have affected the validity of the basic premises supporting the doctrine and require judicial consideration and review. With each session the Court applies the law to disputes developing as the result of the host of technological and social changes evolving during the 20th century. The Court has found, for example, that the noise of airplanes taking off and landing at an airport near a petitioner's residence is tantamount to the "compensable taking" of the petitioner's property. Is it not, therefore, reasonable that the taking of petitioners' dock should also fall into the realm of compensability? The present circumstances require that the court restate the doctrine in terms which will control its scope and application as reflected by the needs of the 20th century.

2. Technically, the courts were to define the limits of doctrine of navigational servitude and to supervise its application by governmental agencies. In fact, the past review of congressional dealings with the nation's waterways under the guise of the protection has failed as an effective check on congressional power. The courts have supported a policy of noninterference in accepting without scrutiny congressional doctrines that various projects benefit navigation. Over the years Congress has passed much legislation under the label of social benefit or welfare with scant attention to those whose rights are impaired by the implementation of such legislation. Every government project located near or on a public waterway has been met by a bevy of legal actions instituted by those whose property rights were impaired by such projects. Yet, such property owners have been offered little compensation for their losses. The courts appear to be either overawed or blinded by the label "government project" and are wont to check or at least question the streamroller like federal legislation. The matter in which navigational servitude has been permitted to go from a necessary rule to secure freely an uninhindered passage on navigable waterways to its present scope needs to be reconsidered by the court.

3. In granting petitioners a permit for the construction of their dock, the government, while not creating a property right in the permit, created the means for petitioners to obtain property. Petitioners, relying on the permit, invested hard earned money in constructing their dock. May the property acquired on the reliance of a valid government permit be destroyed through the unilateral action of the gov-

ernment without the payment of adequate compensation to the property owner? It would appear that such unilateral action defies the basic principals of the Fifth Amendment's guarantees against the destruction of private property, especially if the property interest is acquired only upon government approval. The Court should look into such government practice of giving with one hand and taking away with another.

The pier in question was constructed pursuant to a permit issued in 1946 by the Secretary of War. Subsequent activities by the government to improve flood control of the waters of the Monongahela River caused the normal level of the river to rise, destroying the usefulness of Petitioners' pier. In essence, therefore, the destruction of the Petitioners' property was the direct result of government activity. What for the United States contends is that it is relieved of what would otherwise be its constitutional obligation to pay compensation because the permit issued by the Secretary contained an exculpatory clause. It is the position of Petitioners that authority was granted to the Secretary by the Congress to insure against the erection of structures which would impede navigation. The only function which the Secretary had was to determine whether the proposed construction would have such an effect on navigation which it was the government's function to protect. Having determined that the structure sought to be erected by Petitioners would have no such effect, the Secretary had no alternative but to issue a permit therefore. The Congress did not give the Secretary any authority to insist that the applicant surrender a constitutional right as consideration for the permit. Certainly, the law will not infer a willingness as the part of the permit holder

to surrender his constitutional right except in the face of a clear and uncoerced waiver, and there is no evidence of such a waiver in this case. There is not even a writing signed by the Petitioners.

The situation here is the same as if a municipality were to condition the grant of a zoning or building permit on the waiver of any claim to compensation if the municipality should at some future date decide to acquire the property for a highway, a school, a police station, a redevelopment project, or anything else. Certainly, any Court would hold that if the application conforms to the existing zoning and building laws, the municipality has no alternative but to issue the permit and any verbiage thereon purporting to waive future claims for damages as a result of a condemnation is invalid.

In **Standard Airlines v. Civil Aeronautics Board,** 177 F. 2d. 18, (1949) the Court held a similar condition for the granting of a permit to be invalid. Standard Airlines had been granted an operating permit by the Civil Aeronautics Board, which the Board wished to revoke without granting Standard a hearing. The Board based its action on the fact that one of the conditions precedent for granting the permit was that the permit would be subject to revocation without a hearing. However, the Court held that such a condition was invalid in that the revocation would destroy, not a license property, but investment property. The Court held that, "The Government cannot make a business dependent upon a permit, and make an otherwise unconstitutional requirement a condition to the permit." If we apply such reasoning to the instant case, we have the issuance of a permit for the construction of a pier in a navigable stream based

on the unconstitutional provision that the pier may be destroyed at any time through government activity without the owner of the pier being compensated therefor.

4. The application of the doctrine of navigational servitude has not only caused economical harm to the Petitioners but continues to retard the development of the nations waterways as part of the general economic growth. How may economic development along out waterways be expected to flourish if every potential investor is faced with the sudden destruction of his investment at the hands of the government without adequate compensation? Communities suffering from lack of sufficient economic development may be denied adequate changes for wooing potential developers of their waterways locations without some assurances that such developers will not also face the loss of their investment under the guise of the protection of the public welfare.

CONCLUSION

For these reasons a writ of Certiorari should be issued to review the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted.

Leonard M. Mendelson
3010 Mellon Bank Building
Pittsburgh, Pa. 15219
281-2222

APPENDIX

A. Third Circuit Court of Appeals

RE: Mon Valley Terminal Inc. m et al. Appts. vs. U. S. A. **No. 73-1771** (D. C. Civil No. 72-1044) U. S. A. v.s. 2.80 Acres of Land. etc.. et al. **No. 73-1980** (D. C. Civil No. 66-173)

JUDGMENT ORDER

After considering all contentions raised by the appellant. we find no error in the pretrial ruling of the district court of May 22. 1973 or the order of the district court of July 3. 1973: and it is

ADJUDGED and ORDERED that the judgments of the district court be and are hereby affirmed.

Costs taxed against appellant.

S James Hunter. III. Circuit Judge

Dated: March 12. 1974

B1. District Court for Western District of Pennsylvania

PRETRIAL RULING

IN THE DISTRICT COURT OF THE UNITED S?
For the Western District of Pennsylvania

UNITED STATES OF AMERICA.

Plaintiff

— vs —

2.80 ACRES OF LAND, MORE OR LESS, SITUATE IN WASHINGTON, WESTMORELAND and FAYETTE COUNTIES, STATE OF PENNSYLVANIA AND CHARLEROI COMMUNITY PARK FUND, ET AL

Defendants

Civil Action No. 66-173

The government has requested a pretrial ruling in the above captioned case on the issue of the landowner's right to compensation for a dock constructed in the Monongahela River by a predecessor in title, which dock has been rendered non-functional as a result of the government's having raised the level of the river to its high-water mark, thus rendering it impractical to load or unload barges and vessels from the dock.

The dock was constructed pursuant to a permit issued by the Secretary of War under 33 U.S.C.A. Section 403. The permit was granted subject to the following condition:

(g) That the United States shall in no case be liable for any damage or injury to the structure or work herein authorized which may

be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claim or right to compensation shall accrue from any such damage.

It is the contention of the landowner that the impact of sub-paragraph (g) on the issue is modified by the "NOTE" at the beginning of the permit which reads as follows:

The government has requested a pretrial ruling in the above captioned case on the issue of the landowner's right to compensation for a dock constructed in the Monongahela River by a predecessor in title, which dock has been rendered non-functional as a result of the government's having raised the level of the river to its high-water mark, thus rendering it impractical to load or unload barges and vessels from the dock.

The dock was constructed pursuant to a permit issued by the Secretary of War under 33 U. C. A. Section 403. The permit was granted subject to the following condition:

(g) That the United States shall in no case be liable for any damage or injury to the structure or work herein authorized which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claim or right to compensation shall accrue from any such damage.

It is the contention of the landowner that the impact of sub-paragraph (g) on the issue is modified by the "NOTE" at the beginning of the permit which reads as follows:

> "It is to be understood that this instrument does not give any property rights either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to private property or invasion of private rights, or any infringement of Federal, State, or local laws or regulations, nor does it obviate the necessity of obtaining State asset to the work authorized. IT MERELY expresses THE ASSENT OF THE FEDERAL GOVERNMENT SO FAR AS CONCERNS THE PUBLIC RIGHTS OF NAVIGATION."

Although the defendant landowner urges to the contrary, it is clear that the intent of this NOTE is to delineate the efficacy of the permit so far as the grantee is concerned and not to restrict the grantor, that is, the grantee-landowner is not given authority through the issuance of the permit to injure private or invade private rights or infringe federal, state or local laws; the grantor merely assents to the construction of the dock insofar as the public rights of navigation are concerned.

It is also urged by the landowner that the Secretary of War exceeded the authority vested in him by 33 U. S. C. A. Section 403 by conditioning the permit as he has done in sub-paragraph (g). In **United States v. Applachian Power Company**, 311 U. S. 377 (1940), a case challenging, **inter alia**, the power of the Federal Power Commission to make provisions in its licenses for the construction of dams which were unre-

lated to navigation, the power company contending that such provisions are beyond the power of the Commission and indeed beyond the constitutional power of Congress to authorize, the court in upholding the provisions stated:

> "The license conditions to which objection is made have an obvious relationship to the exercise of the commerce power. Even if there were no such relationship, the plenary power of Congress Over navigable waters would empower it to deny the privilege of constructing an obstruction in those waters. It may likewise grant the privilege on terms."

With respect to the assertions by the landowner that neither Section 10 of the Act of March 3, 1899, nor the commerce clause authorize the taking of private property without compensation, the Supreme Court as recently as 1967 in **United States v. Rands,** 389 U. S. 121 stated:

> "The power to regulate navigation confers upon the United States a 'dominant servitude,' which extends to the entire stream and the stream bed below ordinary high-water mark. The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject. Thus, without being constitutionally obligated to pay compensation, the United States may change the course of a navigable stream, or otherwise impair or destroy a riparian owner's access

to navigable waters even though the market value of the riparian owner's land is substantially diminished (citations omitted)." at page 123.

It is the opinion of this court that sub-paragraph (g). which is essentially nothing more than a restatement of the law on the subject. controls and. therefore. the landowner is not entitled to compensation for the decreased utility of the dock.

S Herbert P. Sorg.
D. J.

Dated: May 22. 1973.

cc: United States Attorney.
633 United States Courthouse. Pgh.. Pa. 15219.

Hollinshead and Mendelson. Esquires.
3010 Mellon Bank Bldg.. Pgh.. PA. 15219

B2.

ORDER

(Filed July 3. 1973.)

AND NOW. after hearing upon the defendant's Motion for Summary Judgment in the above-entitled case and upon due consideration of the briefs and arguments of counsel.

IT IS ORDERED. for the reasons stated in the Pre-trial Ruling of this Court dated May 22. 1973. in **United States of America v. 2.80 Acres of Land, more or less, Situate in Washington, Westmoreland and Fayette Counties, State of Pennsylvania, and Charleroi Community Park Fund, et al.,** Civil Action

No. 66-183, a copy of which is attached hereto, that defendant's Motion for Summary Judgment be and the same is hereby granted.

S Herbert P. Sorg.
D. J.

Dated: July 3, 1973.

cc: United States Attorney, 633 U. S. Courthouse, Pittsburgh, Pennsylvania, 15219.

Leonard M. Mendelson, Esquire, Hollinshead and Mendelson, 3010 Mellon Bank Building, Pittsburgh, Pennsylvania, 15219.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1858

MON VALLEY TERMINAL, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The petitioners are the owner and lessee of a wharf on the Monongahela River in Washington County, Pennsylvania. The United States, as an improvement to navigation, built a dam which raised the level of the river to its ordinary high water mark. This apparently dimininished the usefulness of petitioners' wharf by making ships ride higher above the wharf than they otherwise would have except in high water (Pet. 4-6; Pet. App. 15).

Petitioners brought actions under the Tucker Act, 28 U.S.C. 1346(a)(2), and the Declaration of Taking Act, 40 U.S.C. 258a, to secure just compensation for the partial loss of use of the wharf. The district court held that the petitioners were not entitled to compensation from the United States because the power

to regulate navigation under the Commerce Clause of the Constitution confers upon the United States a dominant servitude which extends to the entire stream and its bed below the ordinary high water mark and because petitioners held the wharf under permits granting them no property rights and expressly excluding liability of the United States for damages incurred as a result of improvements to navigation (Pet. App. 15-19). The court of appeals affirmed (Pet. App. 14).

The decisions below are correct and require no further review.

1. Petitioners maintained the wharf by virtue of a revocable permit issued by the Corps of Engineers under 33 U.S.C. 403. The permit provides:

> It is to be understood that this instrument does not give any property rights either in real estate or material, or any exclusive privileges * * *.
>
> * * * * *
>
> That the United States shall in no case be liable for any damage or injury to the structure or work herein authorized which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claim or right to compensation shall accrue from any such damage. [Pet. App. 16-17.]

Under the terms of the permit, petitioners acquired no property rights, nor any right to compensation from the United States for loss of use of the wharf caused by the improvement of navigation. Under simple contract law petitioners are barred from any recovery. See also *United States* v. *Fuller*, 409 U.S. 488.

2. In *United States* v. *Rands*, 389 U.S. 121, this Court held (at 122-123):

> The Commerce Clause confers a unique position upon the Government in connection with navigable waters. "The power to regulate commerce comprehends the control for that purpose, amd to the extent necessary, of all the navigable waters of the United States * * *. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress." *Gilman* v. *Philadelphia*, 3 Wall. 713, 724-725 (1866). This power to regulate navigation confers upon the United States a "dominant servitude", *FPC* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 249 (1954), which extends to the entire stream and the stream bed below ordinary high-water mark. The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U.S. 592, 596-597 (1941); *Gibson* v. *United States*, 166 U.S. 269, 275-276 (1897). Thus, without being constitutionally obligated to pay compensation, the United States may change the course of a navigable stream, *South Carolina* v. *Georgia*, 93 U.S. 4 (1876), or otherwise impair or destroy a riparian owner's access to navigable waters, *Gibson* v. *United States*, 166 U.S. 269 (1897); *Scranton* v. *Wheeler*, 179 U.S. 141 (1900); *United States* v. *Commodore Park, Inc.*, *States* v. *Commodore Park, Inc.*, 324 U.S. 386 (1945), even though the market value of the riparian owner's land is substantially diminished.

The courts below thus correctly concluded that, because of the servitude in favor of the United States, petitioners have no right of recovery for the lessened usefulness of their wharf caused by the raising of the water level of the river to improve navigation.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

DOJ-1974-09